Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC. 20554

In the Matter of:	)	
	)	
Communications Assistance for Law Enforcement Act	)	CC Docket No. 97-213
	)	

REPLY OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") submits this reply in support of its comments urging the Commission to grant a two-year industrywide extension of the date set by the Communications Assistance for Law Enforcement Act ("CALEA") for compliance with section 103 of that statute. Other parties overwhelmingly support such an extension because CALEA-compliant equipment will not be available until the year 2000 at the earliest. Indeed, of the 35 commenters, only the Department of Justice and the Federal Bureau of Investigation ("DOJ/FBI") oppose an extension. DOJ/FBI take one untenable position after another, even going so far as to insist that the Commission lacks statutory authority to grant an extension on an industrywide basis. As we show below, DOJ/FBI's arguments are without merit. Such an extension is both permissible and necessary, and the Commission should promptly grant it.

DISCUSSION

DOJ/FBI rely in the first instance on a straw man. They contend that industry is demanding an extension because a stable safe harbor standard does not yet exist.[1/] But that contention is simply wrong, and with it falls the bulk of DOJ/FBI's argument. Carriers seek an extension, not because of the absence of a safe harbor, but because *no products* based on *any*

1/ DOJ/FBI Comments at 14-15.

conception of CALEA's requirements are commercially available or will be for at least two years. Compliance is not, and will not be, "reasonably achievable through application of technology available within the compliance period."[2/] That is the substantive test for granting an extension under section 107(c), and that is the basis for the extension requests.

DOJ/FBI cannot credibly dispute the factual underpinning for those requests. DOJ/FBI assert that carriers have presented "no evidence" to justify an extension,[3/] but that is nonsense. Manufacturers have unanimously represented to the Commission that they do not now have CALEA-compliant products and will not be able to offer such products until the year 2000 at the earliest.[4/] For their part, DOJ/FBI identify *no* currently available CALEA-compliant products; indeed, they have conceded in their deficiency petition that products implementing the punch list items could not become commercially available for at least another 18 months.[5/]

2/ 47 U.S.C. § 1006(c)(2).

3/ DOJ/FBI Comments at 16.

4/ *See, e.g.*, Petition for Extension of Compliance Date, filed by AT&T Wireless Services, Lucent Technologies, and Ericsson, March 30, 1998; Petition for Rulemaking, filed by Telecommunications Industry Association, April 2, 1998. Even Bell Emergis - Intelligent Signalling Technologies ("Bell Emergis") implicitly acknowledges that carriers need an extension. Bell Emergis admits that "serious challenges" remain in the development of CALEA solutions and that Bell Emergis' proposed solution will be unable to provide many CALEA functionalities that "can only be provided through a switch-based approach." *See* Bell Emergis Comments at 3, 4. Thus, even if the Bell Emergis solution worked flawlessly, carriers would have to wait for switch-based solutions to achieve CALEA compliance. In fact, Ameritech — the carrier that has worked most closely with Bell Emergis — has concluded that its solution "ha[s] significant technical problems that would require substantial modification before it could operate with the existing network and be compliant with CALEA." *See* Ameritech Comments at 7-8; *see also* Petition for Extension of Time, filed by Ameritech Operating Companies and Ameritech Mobile Communications, Inc., April 24, 1998, at 6-7.

5/ *See* Joint Petition for Expedited Rulemaking, filed by DOJ/FBI, March 27, 1998, at 63.

Also, the Commission plainly has authority to grant an industrywide extension. DOJ/FBI point to no language in section 107(c)(2) that prevents the Commission from granting such an extension, and there is none. Section 107(c)(2) does not state that the Commission may act only on petitions filed pursuant to section 107(c)(1). Rather, section 107(c)(2) states that the Commission "may . . . grant an extension" if the Commission determines that compliance with section 103 is not reasonably achievable. In addition, the Communications Act affirmatively authorizes the Commission to "perform any and all acts, *make such rules and regulations*, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i) (emphasis added). The Commission should therefore reject DOJ/FBI's crabbed view of Commission authority — a view that is designed simply to erect procedural hurdles to a remedy that is obviously in the public interest. Since the record in this proceeding, and the extension petitions already filed, demonstrate so clearly that an industrywide extension is appropriate, no purpose would be served by requiring several thousands more carriers to file petitions.[6/]

Moreover, like other administrative agencies, the Commission enjoys broad discretion to proceed by either rulemaking or adjudication. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-94 (1974); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 675 (D.C. Cir. 1973) (power to make rules upheld where statutory provision authorizing adjudication "does not use limiting language suggesting that adjudication alone is the only proper means of

---

6/ *MCI v. AT&T*, 512 U.S. 218 (1994), on which DOJ/FBI rely, *see* DOJ/FBI Comments at 2, is wholly inapposite. The Court there found that the Commission had ordered carriers not to do precisely what the statute expressly commanded that they "shall" do. In contrast, far from commanding the Commission to address extension requests on a laborious petition-by-petition basis, section 107(c)(2) states that the Commission "may" grant extensions, without limitation, so long as a factual predicate is satisfied.

elaborating the statutory standard").[7] Indeed, "agency discretion is at its peak in deciding such matters as whether to address an issue by rulemaking or adjudication." *American Gas Ass'n v. FERC*, 912 F.2d 1496, 1519 (D.C. Cir. 1990). And if ever there were a case appropriate for rulemaking, this is it. A single, overriding fact would be dispositive of each and every individual carrier petition: The technology necessary for compliance is and will not be available for at least two years beyond the statutory compliance date.[8]

Second, contrary to the arguments of DOJ/FBI, the Commission plainly has power to defer the compliance obligations of carriers pursuant to section 107(b)(5) of CALEA.[9] That section explicitly authorizes the Commission to adjust the time when carriers must comply with section 103 where, as here, a standard has been challenged in a deficiency petition and there may be a transition to a new standard. Specifically, section 107(b)(5) states that the Commission

---

[7] *See also United States v. Storer Broad. Co.*, 351 U.S. 192, 202-03 (1956) (hearing requirement in Communications Act does not "withdraw[] from the power of the [Federal Communications] Commission the rulemaking authority necessary for the orderly conduct of its business").

[8] Even if CALEA required individual carrier extensions, the Commission still could use its rulemaking authority to streamline the extension process. *See* AT&T Comments at 6 n.17; *see also* CTIA Comments at 16 n.24; TIA Comments at 9. It is well-established that "even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve issues of general applicability unless Congress clearly expresses an intent to withhold that authority." *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 612 (1991); *accord Heckler v. Campbell*, 461 U.S. 458, 467 (1983). Thus, the Commission here could establish by rule that compliance is not reasonably achievable for broad classes of carriers. A rule, for example, could specify that compliance will not be reasonably achievable until October 2000 for all carriers using Lucent and Nortel switching equipment. However broadly the Commission wishes to define these classes, carriers could file short petitions with the Commission explaining how the rule applies to them. The Commission then could grant summary individual extensions based on the rule.

[9] *See* AT&T Comments at 6; PCIA Comments at 12-13; TIA Comments at 6-8; U S WEST Comments at 16-20.

may "provide a reasonable time" for compliance and "defin[e] the obligations of telecommunications carriers under section 103 during any transition period." 47 U.S.C. § 1006(b)(5). Moreover, nothing requires the Commission to take action under section 107(b)(5) on a carrier-by-carrier basis.

DOJ/FBI do not deny that adjudicating individual petitions would drain the resources of the Commission and carriers. DOJ/FBI could not make such a claim, given their own finding that over 3,000 telephone service companies may have to comply with CALEA.[10/] Instead, DOJ/FBI assert that such burdens can be avoided because DOJ/FBI may agree to forbear from bringing enforcement actions against carriers.[11/] What DOJ/FBI do not disclose is that they will *not* forbear unless a carrier agrees to waive its basic legal rights, including its right to challenge the punch list at issue in the deficiency petition proceeding now before the Commission.[12/] Nor, of course, do DOJ/FBI guarantee that other law enforcement agencies, including state and local agencies, will forbear from seeking enforcement.[13/] In short, DOJ/FBI offer the sleeves out of their vest. Carriers will file petitions and the Commission will have to adjudicate them, unless the Commission adopts an industrywide extension.

Finally, DOJ/FBI are wrong that granting an extension will delay carrier compliance with CALEA. As noted above and in U S WEST's opening comments, carriers will,

---

10/ *See* Final Notice of Capacity, 63 Fed. Reg. 12,218, 12,221 (1998) .

11/ *See* DOJ/FBI Comments at 17-19.

12/ *See* Attachment B to DOJ/FBI Comments (letter from Steven R. Colgate to Tom Barba, February 3, 1998) at 4.

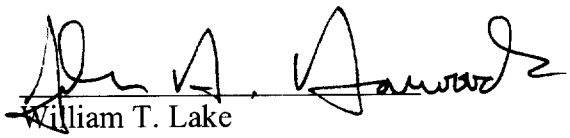
13/ *See* 18 U.S.C. § 2522(a) (permitting any court that authorizes a Title III interception to order a carrier to comply with CALEA).

in all events, be unable to comply with section 103 by the statutory compliance date. That is because compliant technology is not commercially available today and because manufacturers have said none will be available until the year 2000 at the earliest. Indeed, the key to enabling manufacturers to bring reliable, compliant products to market as soon as possible is for the Commission to act promptly on the pending deficiency petitions so that manufacturers will have a stable standard on which to base those products. It blinks reality to think that manufacturers will go forward without such a standard; indeed, nothing in CALEA obligates them to do so. Thus, denying carriers an extension would have only one effect: It would leave them exposed to enforcement actions for failing to install equipment that does not exist.

CONCLUSION

For the foregoing reasons, the Commission should promptly grant a two-year, industrywide extension of the CALEA compliance deadline.

Respectfully submitted,



William T. Lake
John H. Harwood II
Samir Jain
Todd Zubler
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037-1420
(202) 663-6000

Kathryn Marie Krause
Edward M. Chavez
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2859

Counsel for

U S WEST, Inc.

Of Counsel

Dan L. Poole
U S WEST, Inc.

May 15, 1998

CERTIFICATE OF SERVICE

I, Todd C. Zubler, hereby certify that, on this May 15, 1998, I have caused a copy of the foregoing "Reply of U S WEST, Inc." to be served by hand or first class mail, postage prepaid, on each of the parties set forth on the attached service list.

Todd C. Zubler

Honorable William E. Kennard
Federal Communications Commission
1919 M Street, N.W. - Room 814
Washington, D.C. 20554

The Honorable Harold Furchtgott-Roth
Federal Communicaitons Commission
1919 M. Street, N.W. - Room 802
Washington, D. C. 20554

The Honorable Susan Ness
Federal Communications Commission
1919 M Street, N.W. - Room 832
Washington, D.C. 20554

The Honorable Michael Powell, Commissioner
Federal Communications Commission
1919 M Street, N.W. - Room 844
Washington, D.C. 20554

The Honorable Gloria Tristani
Federal Communications Commission
1919 M Street, N.W. - Room 826
Washington, D.C. 20554

David Wye
Telecommunications Policy Analyst
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W. - Room 5002
Washington, D.C. 20554

Lawrence Petak
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W. - Room 230
Washington, D.C. 20554

Christopher J. Wright
General Counsel
Federal Communications Commission
1919 M Street, N.W. - Room 614
Washington, D.C. 20554

Daniel Phythyon, Chief
Wireless Telecommunications Bureau
Federal Communications Commissions
2025 M Street, N.W. - Room 5002
Washington, D.C. 20554

A. Richard Metzger, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. - Room 500B
Washington, D.C. 20554

Geraldine Matise
Chief, Network Services Division
Common Carrier Bureau
2000 M Street, N.W. - Room 235
Washington, D.C. 20554

Kent Nilsson
Deputy Division Chief
Network Services Division
Common Carrier Bureau
2000 M Streeet, N.W. - Room 235
Washington, D.C. 20554

David Ward
Network Services Division
Common Carrier Bureau
2000 M Street, N.W. - Room 210N
Washington, D.C. 20554

Charles Isman
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W. - Room 230
Washington, D.C. 20554

Jim Burtle
Office of Engineering and Technology
Federal Communications Commission
2000 M Street, N.W. - Room 230
Washington, D.C. 20535

The Honorable Janet Reno
Attorney General
Department of Justice
Constitution Ave. & 10th Street, N.W.
Washington, D.C. 20530

The Honorable Stephen Colgate
Assistant Attorney General
Department of Justice
Constitution Ave. & 10th Street, N.W.
Washington, D.C. 20530

Stephen W. Preston, Assistant Attorney General
Douglas N. Letter, Appellate Litigation Counsel
Civil Division. Department of Justice
601 D Street, N.W., Room 9106
Washington, D.C. 20530

Barry Steinhart/A. Cassidy Sehgal
William J. Brennan
Fellow American Civil Liberties Union
125 Broad Street
18th Floor
New York, NY 10004

The Honorable Louis J. Freeh
Director
Federal Bureau of Investigation
935 Pennsylvania Ave., N.W.
Washington, D.C. 20535

Larry R. Parkinson
General Counsel
Federal Bureau of Investigation
935 Pennsylvania Ave., N.W.
Washington, D.C. 20535

H. Michael Warren, Section Chief
CALEA Implementation Section
Federal Bureau of Investigation
14800 Conference Center Drive, Suite 300
Chantilly, VA 22021

Jerry Berman
James X. Dempsey
Center for Domocracy and Technology
1634 Eye Street, N.W., Suite 1100
Washington, D.C. 20006

Electronic Privacy Information Center
666 Pennsylvania Avenue, SE
Suite 301
Washington, D.C. 20003

Grant Seiffert, Director of Government Relations
Matthew J. Flanigan
Telecommunications Industry Association
1201 Pennsylvania Ave., N.W., Suite 315
Washington, D.C. 20004

Elaine Carpenter
Aliant Communications
1440 M Street
Lincoln, NE 68508

International Transcription Service, Inc.
1231 20th Street, N.W., First Floor
Washington, D.C. 20036

Pamela J. Riley/David A Gross
Airtouch Communications, Inc.
1818 N Street, N.W., Suite 320 South
Washington, D.C. 20036

Stewart A. Baker/Thomas M. Barba
J. Benjamin Ederington
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Teresa Marrero
Teleport Communications Group, Inc.
Two Teleport Drive
Staten Island, NY 10311

Stanton McCandlis
Electronic Frontier Foundation
1550 Bryant Street, Suite 725
San Francisco, CA 94103-4832

Michael Altschul, V.P. & General Counsel
Randall S. Coleman, V.P.
Cellular Telecommunications Industry Assoc.
1250 Connecticut Avenue, N.W., Suite 200
Washington, D.C. 20036

Andre J. Lachance
GTE Service Corporation
1850 M Street, N.W., Suite 1200
Washington, D.C. 20036

Carolyn G. Morris
US Department of Justice
Federal Bureau of Investigaitons
J. Edgar Hoover Building
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Emilio W. Cividanes
Omnipoint Communications, Inc.
Piper & Marbury, LLP
1200 19th Street, N.W.
Washington, D.C. 20036

Andy Oram
O'Reilly & Assoc.
90 Sherman St.
Cambridge, MA 02140

Marty Schwimmer, Network Services Division
Common Carrier Bureau
Federal Communications Commission
2000 M Street, N.W., Room 290B
Washington, D.C. 20554

Robert S. Foosaner/Lawrence R. Krevor
Laurel L. Holloway
Nextel Communications, Inc., Suite 425
1450 G Street, N.W.
Washington, D.C. 20005

L. Marie Guillory/Jill Canfield
National Telephone Cooperative Assoc.
2626 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

David L. Nace/B. Lynn F. Ratnavale
Lukas, Nace, Gutierrez & Sachs Chartered
1111 19th Street, N.W., Suite 1200
Washington, D.C. 20036

Peter M. Connolly
Koteen & Naftalin
United States Cellular Corporation
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

Henry M. Rivera/Larry S. Solomon,
J. Thomas Nolan, M. Tamber Christian
Metricom, Inc.
Ginsburg, Feldman & Bress, Chtd.
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Michael K. Kurtis/Jeanne W. Stockman
Kurtis & Associates, PC
2000 M Street, N.W., Suite 600
Washington, D.C. 20036

Mark C. Rosenblum/Ava B. Kleinman
Seth S. Gross
295 North Maple Avenue
Room 3252F3
Basking Ridge, NJ 07920

Kevin C. Gallagher, Sr. V.P &
General Counsel & Secretary
360° Communications Company
8725 West Higgins Road
Chicago, IL 60631

Barry Steinhart/A. Cassidy Sehgal
William J. Brennan
Fellow American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

Electronic Frontier Foundation
1550 Bryant Street, Suite 725
San Francisco, CA 94103-4832

James R. RocheGlobecast
North America, Inc.
400 North Capitol Street, N.W.
Suite 880
Washington, D.C. 20001

Eric W. DeSilva
Stephen J. Rosen
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Caressa D. Bennet/Dorothy E. Cukier
Rural Telecommunications Group
Bennet & Bennet, PLLC
1019 19th Street, N.W., Suite 500
Washington, D.C. 20036

Stuart Polikoff, Sr. Regulatory &
Legislative Analyst
Lisa M. Zaina, V.P. & General Counsel
OPASTCO
21 Dupont Circle, N.W., Suite 700
Washington, D.C. 20036

Mark J. Golden, Sr. V.P., Industry Affairs
Robert Hoggarth
Personal Communications Industry Association
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

Carol C. Harris/Christine M. Gill
Anne L. Fruehauf
Southern Communications Services
McDermott, Will & Emery
600 Thirteenth Street, N.W.
Washington, D.C. 20005

M. Robert Sutherland
Theodore R. Kingsley
Bellsouth Corporation
1155 Peachtree Street, N.E., Suite 1700
Atlanta, GA 30309-3610

John T. Scott, III
Bell Atlantic Mobile, Inc.
Crowell & Moring, LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Richard McKenna/John F. Raposa
GTE Service Corporation
600 Hidden Ridge, HQE03J36
P. O. Box 152092
Irving, TX 75015-2092

James D. Ellis/Robert M. Lynch
Durward D. Dupre, Lucille M. Mates,
Frank C. Magill
SBC Communications, Inc.
One Bell Plaza, Suite 3703
Dallas, Texas 75202

Roy Neel/Mary McDermott/Linda Kent/
Keith Townsend/Lawrence E. Sarjeant
USTA
1401 H Street, N.W., Suite 600
Washington, D.C. 20005

William R. Roughton, Jr.
PrimeCo Personal Communications, L.P.
601 13th Street, Suite 320 South
Washington, D.C. 20005

Judith St. Ledger-Roty/Paul G. Madison
Paging Network, Inc.
Kelley, Drye & Warren, LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Michael P. Goggin
Bellsouth Cellular Corp.
1100 Peachtree Street, N.W., Suite 910
Atlanta, GA 30309-4599

Stephen L. Goodman
William F. Maher, Jr.
Halprin, Temple, Goodman & Sugrue
1100 New York Ave., N.W., Suite 650 East Tower
Washington, D.C. 20005

J. Lloyd Nault, II
BellSouth Telecommunications, Inc.
4300 BellSouth Center
675 West Peachtree Street, N. E.
Atlanta, GA 30375

Richard C. Barth/Mary E. Brooner
Motorola, Inc.
1350 I Street, N.W., Suite 400
Washington, D.C. 20005

Barbara J. Kern, Counsel
Ameritech Corporation
4H74
2000 Ameritech Center Drive
Hoffman Estates, Illinois 60196

Richard R. Metzger
Emily M. Williams
Association for Local
Telecommunications Services
888 17th Street, N.W., Suite 900
Washington, D.C. 20006

Kurt A. Wimmer, Esq.
Gerard J. Waldron, Esq.
Covington & Burling
1201 Pennsylvania Ave., N.W.
P. O. Box 7566
Washington, D.C. 20044-7566

Douglas I. Brandon
AT&T Wireless Services
1150 Connecticut Avenue
Washington, D.C. 20036

Glenn S. Rabin
Federal Regulatory Counsel
Alltel Corporate Services, Inc.
655 15th Street, N.W., Suite 220
Washington, D.C. 20005

James X. Dempsey, Senior Staff Counsel
Daniel J. Weitzner, Deputy Director
Center for Democracy and Technology
1634 Eye Street, N.W., Suite 1100
Washington, D.C. 20006

Martin L. Stern
Lisa A. Laventhal
Preston Gates Ellis & Rouvelas
Meeds LLP
1735 New York Avenue, N.W., Suite 500
Washington, D.C. 20006

Stephen G. Kraskin/Sylvia Lesse
Joshua Seidemann
Kraskin, Lesse & Cosson, LLP
2120 L Street, N.W., Suite 520
Washington, D.C. 20037

Joseph R. Assenzo, General Attorney
Sprint Spectrum, L.P.
4900 Main Street, 12th Floor
Kansas City, MO 64112

Charles M. Nalbone
BellSouth Personal Communications, Inc.
3353 Peachtree Road, N.E., Suite 400
Atlanta, GA 30326

Michael W. White
BellSouth Wireless Data, L.P.
10 Woodbridge Center Dr., 4th Floor
Woodbridge, NJ 07095-1106

Catherine Wang
ICG Telecom Group, Inc.
Swidler & Berlin, Chtd.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Susan W. Smith, Director External Affairs
CenturyTel Wireless, Inc.
No. 4 Summer Place
3505 Summerhill Road
Texarkana, TX 75501

James F. Ireland/Theresa A. Zeterberg
Centennial Cellular Corp.
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W., Suite 200
Washington, D.C. 20006

Jill F. Dorsey, General Counsel/V.P.
Powertel, Inc.
1233 O.G. Skinner Drive
West Point, Georgia 31833

Gerald W. Fikis
Bell Emergis - Intelligent Signalling
Technologies
78 O'Connor Street, Suite 410
Ottowa, Ontario, Canada KIP 3A4